

State of South Dakota

EIGHTY-SIXTH SESSION
LEGISLATIVE ASSEMBLY, 2011

592S0685

HOUSE BILL NO. 1218

Introduced by: Representatives Hunt, Bolin, Brunner, Cronin, Feickert, Gosch, Greenfield, Hansen (Jon), Hickey, Hubbel, Jensen, Kirschman, Kloucek, Kopp, Munsterman, Nelson (Stace), Russell, Steele, Van Gerpen, Venner, and Wick and Senators Novstrup (Al), Kraus, and Schlekeway

1 FOR AN ACT ENTITLED, An Act to prohibit surrogate mother contracts, to prohibit
2 enforcement of such arrangements, and to establish standards to award custody of children
3 born as a result of such arrangements.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

5 Section 1. The Legislature finds that:

6 (1) The enforcement of surrogacy agreements and contracts is contrary to the best
7 interests of children, to the State policy that custody of children should be determined
8 based upon the best interests of the children, that such arrangements are exploitive
9 of women, that such arrangements are contrary to a mother's interest in her
10 relationship with her child, and contrary to the State's interest in protecting the
11 relationship between a mother and her child; and

12 (2) That surrogacy arrangements and contracts, whether written or oral, are in direct
13 conflict with numerous public policies of the State of South Dakota, including: the
14 State's policy prohibiting offers of money or payment of money in connection with



1 an adoption; the State's policy against trafficking in children; the State's policy that
2 no surrender of a mother's parental rights or waiver of her constitutional right to her
3 relationship with her child will be enforced if made prior to the birth of her child; and
4 (3) That surrogacy agreements and contracts are in direct conflict with, and are designed
5 to terminate and destroy, the mother's parental rights, her relationship with her child,
6 and her fundamental liberty and interest in that relationship, contrary to the
7 established public policy and laws of the State of South Dakota.

8 Section 2. Terms used in this Act mean:

- 9 (1) "Surrogacy," an arrangement, whether or not embodied in a contract, written or oral,
10 entered into by two or more persons, including the mother, sometimes referred to as
11 the "surrogate" or "gestational carrier" or "surrogate uterus", and an intended rearing
12 parent or parents, who agree, prior to insemination, or in the case of an implanted
13 embryo, prior to embryo transfer or embryo implantation, to participate in the
14 creation of a child, with the intention that the child will be reared as the child of one
15 or more of the intended parents, other than the mother;
- 16 (2) "Commercial surrogacy," a surrogacy arrangement involving the payment, or
17 agreement to pay, money or any valuable consideration to a broker/intermediary, or
18 the payment, or agreement to pay, money or any valuable consideration (other than
19 payment or reimbursement of medical and hospital expenses currently allowable
20 under adoption law) to a mother;
- 21 (3) "Broker/intermediary," a person, or an agency, association, corporation, partnership,
22 institution, society or organization, which knowingly seeks to introduce or to match
23 a prospective mother with a prospective biological father, or other intended parent,
24 for the purpose of initiating, assisting, or facilitating a surrogacy arrangement;

1 (4) "Intended parent," a person, whether male or female, whether or not genetically
2 related to the child born as a result of a surrogacy arrangement, who is intended to
3 be the person or one of the persons who would raise the child following birth;

4 (5) "Mother," the woman who carries and gives birth to the child, whether or not she is
5 genetically related to the child.

6 Section 3. No physician, licensed by the State of South Dakota, or agent or employee of such
7 a physician shall assist in the process of insemination or embryo transfer or implantation that
8 is in connection with, or is in any way associated with, a surrogacy arrangement. A physician
9 or other person who knowingly or in reckless disregard violates this section is guilty of a Class
10 6 felony. The prosecutor who prosecutes such violation, and the court before whom the violation
11 is brought, shall, separately and independently of each other, report such violation and
12 conviction to the Board of Medical and Osteopathic Examiners.

13 Section 4. Other than the mother and the intended parents, any person, agency, association,
14 corporation, partnership, institution, society or organization, their agents and employees, which
15 engage in, promote, profit from, solicit a woman for, or otherwise assist in, commercial
16 surrogacy arrangements in the State of South Dakota, is guilty of a Class 5 felony.

17 Section 5. Any person or entity who acts as a broker/intermediary in connection with a
18 surrogacy arrangement, whether or not the person is paid or receives other consideration, is
19 guilty of a Class 6 felony.

20 Section 6. Any person, agency, association, corporation, partnership, institution, society or
21 organization, and their agents and employees, who offers, gives, or receives any money or other
22 consideration or thing of value in connection or association with a surrogacy arrangement is
23 guilty of a Class 6 felony.

24 Section 7. A surrogacy contract or arrangement, whether entered into in South Dakota, or

1 in some other state, is unenforceable in South Dakota. A custody dispute concerning a child
2 born as a result of a surrogacy arrangement shall be resolved under South Dakota law.

3 Section 8. The mother of a child born as the result of a surrogacy arrangement has the right
4 to primary physical custody of the child following birth. If the child is in her custody following
5 birth, the mother shall keep the custody of the child if she so chooses, before and during the
6 pendency of any legal action to determine custody, unless there is proof by clear and convincing
7 evidence, that she is unfit or she poses a substantial harm to the child. If the child is not in her
8 custody following birth, the mother may exercise her right to take custody of the child, by
9 notifying the person or entity in whose custody the child then resides, in writing, anytime within
10 one hundred twenty days of the date of the child's birth. Upon proof that such intention was
11 delivered to one or more persons in whose custody the child then resides, the court shall enter
12 an order awarding *pendente lite* custody to the mother. Any claim that the mother is unfit or
13 otherwise presents a likelihood that she will harm the child can only be made after the child is
14 placed with the mother, and all proof of such allegations shall be established by clear and
15 convincing evidence.

16 Section 9. At a final hearing to determine placement of the child born as a result of a
17 surrogacy arrangement, there is a legal presumption that custody of the child should be placed
18 with the mother. This presumption may be overcome by a demonstration, based on clear and
19 convincing evidence, that the mother fails to meet minimal parenting standards necessary to
20 satisfy the basic needs and welfare of the child. Such determinations may not be based on
21 consideration of economic or social class.

22 Section 10. The intended parent in a surrogacy arrangement which is not a commercial
23 surrogacy arrangement and who is not in violation of the provisions of any of sections 3, 4, 5
24 and 6 of this Act is not guilty of a crime, but is subject to civil penalties of not less than thirty

1 thousand dollars and not more than fifty thousand dollars for a first offense, and not less than
2 fifty thousand dollars and not more than eighty thousand dollars for a second offense. An
3 intended parent who is guilty of a third offense is guilty of a Class 1 misdemeanor.

4 Section 11. The intended parent or parents has a duty to provide financial support for a child
5 born as a result of a surrogacy arrangement, whether or not the intended parent has custody of
6 the child. There is a presumption that the noncustodial parent of the child born as a result of a
7 surrogacy arrangement should be given parenting time or visitation, unless it is demonstrated
8 that such visitation would be contrary to the best interests of the child. The parenting time
9 should be liberal, based on the facts of the particular case, consistent with the child's best
10 interests.

11 Section 12. If a surrogacy arrangement is repudiated by either party, the mother is entitled
12 to have all medical and hospital expenses, including prenatal care, and the medical and hospital
13 expenses of the child incurred during child birth and for treatment for any condition of the child
14 immediately following birth, paid for by the intended parent or parents, even though the
15 surrogacy arrangement is unenforceable and the mother has custody of any child born as a result
16 of the surrogacy arrangement.

17 Section 13. If neither the intended rearing parent or parents, nor the mother are willing or
18 able to assume custody of the child, the child shall be placed for adoption in accordance with
19 statute. Until such time as adoption of the child is final, both the intended rearing parent or
20 parents and the mother are obligated consistent with their respective financial abilities, to pay
21 financial support for the child.

22 Section 14. In disputed multi-state surrogacy arrangements within the jurisdiction of the
23 South Dakota courts, South Dakota law applies.